

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

~~~~~  
In re

**JOSEPH P. ZOPPO,**  
Debtor

Chapter 7  
Case No. 02-14836-JNF

~~~~~  
**JAMES ZOPPO, TRUSTEE OF SEVENTY-FIVE  
NORWELL ROAD REALTY TRUST and THE  
ZOPPO FAMILY TRUST,**  
Plaintiff,

v.

Adv. P. No. 02-1363

**JOSEPH P. ZOPPO,**  
Defendant.  
~~~~~

**MEMORANDUM**

**I. INTRODUCTION**

Two matters are before the Court: the “Motion for Partial Summary Judgment and/or Scheduling Trial Date” filed by James Zoppo (“James Zoppo”), trustee of both the Seventy-Five Norwell Road Realty Trust (the “Realty Trust”) and The Zoppo Family Trust (the “Family Trust”), and the “Defendant’s Opposition to Plaintiff’s Motion for Partial Summary Judgment and/or Order Scheduling Trial Date and Cross-Motion for Summary

Judgment” (the “Cross-Motions”). James Zoppo<sup>1</sup> seeks partial judgment with respect to Count II of his three count Complaint through which he alleged that a debt of his brother, Joseph P. Zoppo (“Joseph Zoppo” or the “Debtor”), is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).<sup>2</sup> The Debtor, in opposing the motion, seeks judgment in his favor on Count II and the entry of an order dismissing his Counterclaim against James Zoppo without prejudice to its renewal in state court.

The Court heard the Cross-Motions on November 9, 2005, ordered James Zoppo and the Debtor to file a copy of the docket and relevant pleadings pertinent to this adversary proceeding from the Norfolk County Probate and Family Court, Department of the Trial Court (the “Probate Court”), and took the Cross-Motions under advisement.

The material facts necessary to resolve the Cross-Motions are not in dispute; neither party demonstrated a need for an evidentiary hearing. Additionally, both parties referred to the following: 1) the Memorandum and Order, dated July 12, 2004, in Hayes v. Zoppo, Adv. P. No. 02-1346, Slip op. (Bankr. D. Mass. July 12, 2004), pursuant to which this Court determined that a debt arising from the Debtor’s defalcation while acting in a fiduciary capacity in the sum of \$386,092 was nondischargeable under 11 U.S.C. § 523(a)(4) and

---

<sup>1</sup> All references to James Zoppo, unless otherwise indicated, shall be to him in his capacity as trustee of the Realty Trust and the Family Trust.

<sup>2</sup> In Count II of his Complaint, James Zoppo states that the Debtor “was acting in a fiduciary capacity for the aforesaid Trusts;” that, in his capacity as a fiduciary, he “committed fraud upon the plaintiff;” and that, “[a]s a result of the defendant’s fraud, the plaintiff has suffered substantial monetary losses and damages.” James Zoppo’s Complaint also contained counts under 11 U.S.C. § 523(a)(2)(A) and (a)(6).

entered judgment in favor of John M. Hayes, the Executor of the Estate of Frances R. Zoppo (“Hayes”);<sup>3</sup> and 2) the approval of a compromise between the Debtor and Hayes by the Probate Court with respect to this Court’s July 12, 2004 judgment pursuant to which the Debtor agreed to pay \$100,000 to Hayes in satisfaction of the \$386,092 judgment, which included, as a component, \$190,000 resulting from the improper use of proceeds from a home equity loan on trust property.

The issues presented include: 1) whether James Zoppo is bound by the Probate Court’s approval of the compromise between Joseph Zoppo and Hayes; 2) whether Joseph Zoppo is collaterally estopped from challenging this Court’s determination that he breached his fiduciary duties; 3) if collateral estoppel applies, whether James Zoppo is entitled to a judgment in the sum of \$190,000 or some other amount; and 4) whether the Debtor is entitled to judgment because James Zoppo lacks the ability to assert a claim for \$190,000 because Hayes obtained a judgment, which included damages in that sum, arising out of the same conduct in Adv. P. No. 02-1346.

For the reasons set forth below, the Court shall enter an order denying James Zoppo’s Motion for Partial Summary Judgment and granting the Debtor’s Motion for Summary Judgment. The following shall constitute this Court’s findings of fact and rulings of law in accordance with Fed. R. Bankr. P. 7052.

---

<sup>3</sup> The Court takes judicial notice of its decision as well as the exhibits accepted in evidence at trial.

## II. FACTS

Based upon the evidence submitted at the trial in the adversary proceeding commenced by Hayes, as well as the exhibits attached to the Complaint filed by James Zoppo, the Court finds the following facts.

Thomas F. Zoppo and Frances R. Zoppo were the parents of four sons: Joseph P. Zoppo, James Zoppo, Robert Zoppo, and Thomas A. Zoppo. Thomas A. Zoppo is disabled.

On August 23, 1990, Thomas F. Zoppo created the Family Trust, retaining the power to alter, amend or revoke it. Thomas F. Zoppo designated the Debtor as the trustee of the Family Trust. The terms of the Family Trust provided that during the lifetime of the donor, Thomas F. Zoppo, the trustee was required to distribute to the donor, or as the donor directed, "all or such part of the net income and principal as he from time to time requests; and without any request, the trustee may distribute to the Donor, or apply for his benefit, at any time or times during his lifetime, such amounts or all of the net income and principal as such trustee, in his discretion, thinks advisable for any purpose." According to the trust document, upon the death of the donor, the net income of the Family Trust was to be administered and disposed of for the benefit of Thomas A. Zoppo. Upon Thomas A. Zoppo's death, the principal and any balance of net income remaining were to be distributed "outright and free of trust to the Donor's issue surviving by right of representation."

The Realty Trust, which Thomas F. Zoppo also created on August 23, 1990, was a nominee trust, established for "the purpose of holding the record legal title of the trust

property for the benefit of the beneficiaries.”<sup>4</sup> The Realty Trust provided that “[e]xcept as expressly provided in this instrument, the Trustee shall have no power to deal in or with the trust estate, except as directed by the beneficiaries.” Thomas F. Zoppo was the original trustee. The beneficiaries of the Realty Trust were set forth on a separate “Schedule of Beneficial Interest” as follows:

THOMAS F. ZOPPO and FRANCES R. ZOPPO as joint tenants with the right of survivorship. Upon the death of the survivor THOMAS F. ZOPPO and FRANCES R. ZOPPO to JOSEPH P. ZOPPO as he is Trustee of THE ZOPPO FAMILY TRUST dated August 23, 1990.

The Schedule of Beneficial Interest was signed by Thomas F. Zoppo, Frances R. Zoppo and Joseph P. Zoppo, in his capacity as trustee of the Family Trust.

The Realty Trust did not contain any provision for a successor trustee upon the death of Thomas F. Zoppo. Instead, it contained the following:

(a) Any Trustee hereunder may resign by written instrument, signed and acknowledged by such Trustee, and recorded with the Registry of Deeds where this Trust is duly recorded. The then beneficiaries shall have the right to appoint by unanimous vote a succeeding trustee or remove any then trustee via writing signed by any such beneficiaries. . . .

On September 19, 1990, less than one month after the creation of the Family Trust and the Realty Trust, Thomas F. Zoppo and Frances R. Zoppo, conveyed their real property, which was located at 75 Norwell Road, Dedham, Massachusetts, to the Realty Trust.

On April 13, 1993, Thomas F. Zoppo died.

---

<sup>4</sup> Copies of the Realty Trust and the Family Trust were attached to James Zoppo’s Complaint.

On August 25, 1997, Frances R. Zoppo and Joseph P. Zoppo, as Trustee of the Zoppo Family Trust dated August 23, 1990, executed a document captioned, "Allowance by Beneficiaries for Trustee to Mortgage the trust property." In this document, they stated: "[w]e . . . as the beneficiaries of the SEVENTY-FIVE NORWELL ROAD REALTY TRUST . . . grant to the Trustee of the SEVENTY-FIVE NORWELL ROAD REALTY TRUST, Joseph P. Zoppo, the full power and authority to assign, mortgage, or deal with all or any part of the trust property, and to execute and deliver notes or other evidence of borrowing by or on behalf of the beneficiaries hereof, and to enter in to agreements or arrangements with respect to the trust property."<sup>5</sup> Less than one year later, on June 9, 1998, Frances R. Zoppo executed a Durable Power of Attorney, granting Joseph Zoppo "full power to act for me and in my name in all matters and to do all things which I could do if personally present." In addition, on January 26, 1999, she created The Zoppo Family Irrevocable Trust (the "Irrevocable Trust"). The Irrevocable Trust provided that the Debtor was authorized to distribute "[d]uring the lifetime of the Donor . . . such amounts or all of the net income and principal as such Trustee, in his discretion, thinks advisable for any purpose." The Irrevocable Trust also provided that upon Frances Zoppo's death the Trust principal, "as augmented by all property transferred to the Trustee from any source as a result of the Donor's death," would be available for distribution, in the Debtor's discretion as trustee, for the benefit of Thomas

---

<sup>5</sup> Frances R. Zoppo and the Debtor in his capacity as trustee of the Family Trust denominated themselves beneficiaries of the Realty Trust, although it would appear from the above quoted Schedule of Beneficial Interest, that the Family Trust was not, in fact, a present beneficiary of the Realty Trust, only the holder of an expectancy interest which would vest upon Frances R. Zoppo's death.

A. Zoppo, the Debtor's disabled brother. See Hayes v. Zoppo, Slip op. at 4-5.

Despite the representation that Joseph Zoppo was the trustee of the Realty Trust in the August 25, 1997 document, it was not until February 4, 1999 that Frances R. Zoppo and Joseph Zoppo, individually, executed a document captioned, "Certificate of Appointment Authorization of Beneficiaries." The document, which was notarized on the same day by Harvey E. Lazarus ("Lazarus"), provided the following:

The undersigned being the holder of 100% of the beneficial interest under the Seventy-Five Norwell Road Realty Trust . . . hereby certify as follows:

That said Declaration of Trust is presently in existence and in full force and effect.

That we have appointed Joseph P. Zoppo . . . as successor Trustee under said Trust in the place of Thomas F. Zoppo who has died.

On the same day, February 4, 1999, Joseph Zoppo, individually, executed a document captioned "Acceptance of Appointment," which was also notarized by Lazarus, as well as a "Trustee's Certificate."<sup>6</sup> The Trustee's Certificate, which Joseph Zoppo executed in both his individual capacity and in his capacity as trustee of the Realty Trust, set forth that he was the current trustee of the Realty Trust; that the Realty Trust had not been altered or amended, that "no Beneficiary of said Trust has died or is incompetent;" and that "[t]he undersigned further certifies that he has specifically authorized [sic] by all of the beneficiaries to execute a mortgage with BankBoston and deliver any and all documents necessary to mortgage all right, title and interest to the premises located at 75 Norwell Road,

---

<sup>6</sup> These documents are attached to James Zoppo's Complaint.

Dedham, MA 02026.”

Several days before this transaction, on February 2, 1999, Frances R. Zoppo and Joseph Zoppo had executed a document captioned “Beneficiaries’ Certificate and Letter of Direction (For use with nominee trust)” in which they authorized Joseph Zoppo to execute a Home Equity Credit Line Agreement and Promissory Note and to request advances from time to time under the Home Equity Credit Line and Promissory Note. Lazarus did not notarize this document on the date it was executed; rather he notarized it one day later, on February 3, 1999. Hayes v. Zoppo, Slip op. at 6-7.

On February 11, 1999, Joseph Zoppo executed an open-ended mortgage deed to secure an equity line of credit in the sum of \$190,000. On April 16, 1999, the trust documents were recorded. Id. at 7.

It was around this time, “the end of 1998 into 1999,” that the Debtor’s business, Input/Output Systems (“Input/Output”), lost a major client. Id. at 3. The Debtor testified that he lacked the financial ability to make the kind of capital investment required to keep his business operating. The Debtor used the proceeds from the home equity loan over an eight and one-half month period for his business, and this Court found, specifically, that he failed to explain how \$127,199.68 of the proceeds were used by Input/Output. Id. at 8.

Sometime in 2001, Frances R. Zoppo was diagnosed with lung cancer. On May 31, 2001, over two years after executing the Beneficiaries’ Certificate, she first learned of the mortgage on the Norwell Road property. She died on July 25, 2001. Id. at 12-13. She left a Last Will and Testament and appointed James Zoppo trustee of a Testamentary Trust



under the will. *See* Joseph Zoppo's Amended Complaint for Contempt filed in the Probate Court, ¶ 2. James Zoppo is also a residuary legatee under the will. *Id.* According to Hayes, who was appointed temporary executor of Frances Zoppo's estate on August 14, 2001 and permanent executor on August 21, 2002, Frances R. Zoppo executed a will on June 4, 2001 leaving her entire estate to James Zoppo as trustee of a Testamentary Trust for the benefit of Thomas A. Zoppo.

Several months before his mother's death, Thomas A. Zoppo, on February 4, 2002, commenced an action in the Probate Court (02E-0012GC1) against the Debtor seeking, *inter alia*, his removal as trustee of both the Family Trust and the Realty Trust. On March 22, 2002, the Probate Court removed Joseph Zoppo as trustee of both trusts and appointed James Zoppo successor trustee of both trusts.

Approximately three months later, on July 3, 2002, Joseph P. Zoppo filed a Chapter 7 petition. On September 20, 2002, Hayes filed Adv. P. No. 02-1346. On September 27, 2002, James Zoppo filed Adv. P. No. 02-1363, and Thomas A. Zoppo filed Adv. P. No. 02-1364. Moreover, on December 5, 2002, the Realty Trust sold the 75 Norwell Road property and paid \$178,640.25 to discharge the mortgage and other liens on the property. Petitioners' Pre-Trial Memorandum filed in the Probate Court, ¶24.

On July 8, 2003, because they were represented by the same counsel and their complaints contained virtually identical counts, this Court consolidated the adversary proceedings commenced by James Zoppo and Thomas A. Zoppo (Adv. 02-1363 and Adv. P. 02-1364) for trial and scheduled a trial for October 28, 2003. On the day of the trial, the

parties reported a settlement, and the Court directed the parties to file an agreement by November 14, 2003. One day prior to the deadline, James Zoppo requested an extension of time to file the settlement agreement, which request the Court granted, giving the parties a new deadline of November 24, 2003 for filing settlement papers. In the meantime, on November 4, 2003, the Chapter 7 Trustee filed a Report of No Distribution. Accordingly, Joseph Zoppo's Counterclaim against James Zoppo in this adversary proceeding is deemed abandoned.

As the parties failed to comply with the November 24, 2003 deadline, on December 15, 2003, this Court, in this adversary proceeding, entered an order requiring the filing of settlement papers by December 31, 2003. The parties failed to file the settlement papers. Joseph Zoppo, however, filed, on December 30, 2003, a "Motion to Dismiss, for Sanctions or in the Alternative to Schedule a Trial of the Adversary Proceeding." At a hearing held on March 8, 2004 on Joseph Zoppo's Motion, the parties appeared and again reported a settlement. The Court ordered settlement papers to be filed by March 19, 2004. On March 23, 2004, counsel for James Zoppo and Thomas A. Zoppo requested a continuance. Several weeks later, Joseph Zoppo's counsel reported that James Zoppo and Thomas A. Zoppo had refused to sign the settlement papers.

In the meantime, on January 26, 2004, this Court conducted the trial in Hayes's adversary proceeding against the Debtor. On July 12, 2004, this Court issued its Memorandum and Order in Adv. P. No. 02-1346 holding, *inter alia*, that Joseph Zoppo breached a fiduciary duty to his mother Frances Zoppo and that a \$386,092 debt, which

included the sum of \$190,000, relating to the mortgage on 75 Norwell Road, Dedham, Massachusetts was nondischargeable.<sup>7</sup> Joseph Zoppo appealed the Court's

---

<sup>7</sup> In Hayes v. Zoppo, this Court made the following conclusions of law pertinent to this adversary proceeding:

The first issue which the Court must address is whether Frances Zoppo succeeded in her intention to create an express trust. The manifestations of her intention to create a trust, which preceded Input/Output's financial difficulties, were the execution of the "Allowance of Beneficiaries for Trustee to Mortgage the trust property" on August 25, 1997 and the execution of the Durable Power of Attorney on June 9, 1998. The manifestations of her intention that coincided with the loss of one of Input/Output's major customers were the execution of The Zoppo Family Irrevocable Trust on January 26, 1999 and the execution of the "Beneficiaries' Certificate and Letter of Direction" on February 2, 1999. The execution of these four documents in conjunction with Frances Zoppo's statements to the Debtor, as well as to Mr. Grant and Mr. Lazarus, demonstrate that *she intended the Debtor to act in the capacity of a trustee of an express trust for her benefit, for the benefit of her disabled son Thomas and for the benefit of the Zoppo family.*

\*\*\*

Because the Court finds that the Debtor was the trustee of an express trust, the next issue is whether the Debtor committed a defalcation while acting in his fiduciary capacity in using his mother's assets to pay expenses of Input/Output and other entities. The answer to that question hinges on the credibility of the Debtor's testimony and the circumstantial evidence of when and how the Debtor used money from the liquidation of his mother's assets or from the line of credit on her Dedham home.

\*\*\*

The Court also finds that the Debtor failed to exercise sound business judgment in the performance of his duties. The two primary beneficiaries of the express trust created by Frances Zoppo were elderly. The investment of Frances Zoppo's assets required the exercise of sound judgment so that Thomas's future needs would be satisfied. In particular, the Debtor, in his capacity as a fiduciary, was required to prudently invest

decision.

On December 30, 2004, Hayes and Joseph Zoppo executed a Settlement Agreement. Approximately two weeks later, on January 13, 2005, Hayes filed a petition with the Probate Court seeking approval of the Settlement Agreement dated December 30, 2004. James Zoppo, individually, and as trustee of the Realty Trust and the Family Trust, and Thomas

---

trust assets. Although he rejected the notion that his expenditures of his mother's assets were imprudent, there is nothing in the record to substantiate that his decision was prudent. Because the Plaintiff established that the Debtor systematically took control of and used his mother's assets to prop up a failing business, the Court finds that the burden shifted to the Debtor to account for and explain the use of the trust assets. The Debtor failed to sustain his burden. Indeed, the manner in which the Debtor obtained the use of his mother's assets, suggests a deliberate pattern to loot her assets for personal gain. Knowing that he had lost a major client and knowing that the desktop publishing business was at a cross roads, the Debtor used one source and then another to fund his business enterprises. His defense to the indefensible was that his mother was aware of what he was doing and wanted his business to succeed. In general terms that is undoubtedly true. Frances Zoppo's affidavit and the criminal complaint, however, compel the conclusion that she was not aware of the dire financial condition of Input/Output. Moreover, the Court finds it unlikely that she would have consented to the use of her assets for businesses in which the Zoppo Family Trust did not have an interest.

The Court further finds that the accountings produced by the Debtor are inadequate to dispel the inescapable conclusion that he improperly used his mother's assets for his personal advantage. His testimony was vague and inconsistent with the schedules that he filed under pains and penalties of perjury. For example, with respect to the proceeds from the \$190,000 line of credit, the bulk of the proceeds (\$127,199.68) were not accounted for except to the extent that they were invested in Input/Output. The same problem plagues the use of the \$30,000 from Frances Zoppo's securities.

Slip op. at 18, 20, 25-26 (emphasis supplied).

Zoppo objected to the proposed settlement in the Probate Court.

On April 15, 2005, the Probate Court issued an “Order after Pretrial Conference” and scheduled a trial for June 13, 2005. In its Order, the Probate Court observed that James Zoppo was “the trustee of the testamentary trust under the will of Frances R. Zoppo, and as such . . . the residuary legatee under the will” and that Thomas A. Zoppo was “the sole beneficiary of the trust during his life.” The Probate Court also stated the following:

The assets of the estate include approximately \$5,000.00 in cash and a judgment issued by the United States Bankruptcy Court in favor of the estate and against Joseph P. Zoppo, another of Mrs. Zoppo’s sons, in the principal sum of \$386,000.00. . . .

The liabilities of the estate include at [sic] \$10,000.00 judgment on account of an auto loan, and the costs and expenses of administration, which are in the range of \$40,000.00.

The estate fiduciary has negotiated a settlement of the estate’s claim with Joseph Zoppo. Joseph Zoppo has agreed to pay the sum of \$100,000.00 and to waive any interest he may have in the remainder of the trust.

The respondents, through counsel, expressed the concern that there may be additional funds available from Joseph Zoppo which would permit a higher payment on account of the debt.

Approximately two months later, on June 10, 2005, James Zoppo filed the Motion for Partial Summary Judgment in this adversary proceeding which is now before this Court. Additionally, in the Probate Court, on June 20, 2005, “James Zoppo, and Thomas Zoppo, as persons interested in the estate of Frances R. Zoppo” withdrew their objections to Hayes’s petition to approve the compromise of his claim against Joseph Zoppo. Accordingly, the Probate Court approved the compromise between Hayes and Joseph Zoppo.

On July 20, 2005, Joseph Zoppo filed his Opposition and Cross-Motion for Summary

Judgment. Additionally on July 27, 2005, he filed a Complaint for Contempt in the Probate Court, which he amended on July 28, 2005, in which he complained that, despite the approval of the compromise, James Zoppo “continues to pursue the Norwell Road debt in the United States Bankruptcy Court by, amongst [sic] other things, seeking to obtain a judgment in his favor in an adversary proceeding . . .”

On September 1, 2005, the Probate Court entered a judgment with respect to Joseph Zoppo’s contempt complaint in favor of James Zoppo, individually and as trustee of the Realty Trust and the Family Trust. The Probate Court observed that James Zoppo in this adversary proceeding was “not proceeding as testamentary trustee under the will but rather in his capacity as trustee, and not individually. . . .” It determined that it could find “no clear order that defendant violated” and that it could not find defendant in contempt “of a clear order of this court. . . .” Accordingly, it rejected Joseph Zoppo’s argument under Mass. Gen. Laws ch. 204, § 14 that the settlement agreement was binding on James Zoppo.

On September 12, 2005, this Court entered an order of discharge with respect to all of Joseph Zoppo’s dischargeable debts.

### **III. POSITIONS OF THE PARTIES**

#### **A. James Zoppo**

With respect to Count II of his Complaint, through which he seeks a determination that Joseph Zoppo breached his fiduciary duties as trustee of both the Realty Trust and the Family Trust, James Zoppo asserts that he is entitled to a judgment in the sum of \$190,000 as a result of this Court’s Memorandum and Order dated July 12, 2004, although in his

Complaint he sought \$185,000. He states that the Court's ruling "constitutes collaterally [sic] estoppel with respect to all material issues of law and fact . . . and as such the Order of the Court for \$190,000 with respect to the Line of Credit on the 75 Norwell Road property, should be entered with respect to the Plaintiff's Motion for Partial Summary Judgment." In his Memorandum, he further asserts that Hayes's claim arising from the mortgage on the Norwell Road property "is properly the claim of James Zoppo, Trustee of Seventy-Five Norwell Road Realty Trust as 75 Norwell Road, Dedham, Massachusetts [sic] was the owner of the real estate at the time of the Debtor's fraudulent activity." He adds: "Mrs. Frances Zoppo was at the time of the conversion, a beneficiary of the Seventy-Five Norwell Road Realty Trust and remained so up to the time of her death; thereafter the terms of the Trustee [sic] of Seventy-Five Norwell Road Realty Trust provide that the Zoppo Family Trust became the sole beneficiary."

In a Response to the Debtor's Supplemental Opposition to his Motion for Partial Summary Judgment, James Zoppo distinguishes between the Testamentary Trust and the Family Trust, stating that the Family Trust was not a beneficiary of the estate of Frances Zoppo. He elaborates:

While the Complaint of the Estate of Frances Zoppo included a claim arising from the Defendant's fraud upon the 75 Norwell Road Realty Trust, this claim is properly the claim of James Zoppo, Trustee of The Zoppo Family Trust. Mrs. Frances Zoppo was at the time of the Defendant's fraud, [sic] a beneficiary of the Seventy-Five Norwell Road Realty Trust and remained so up until the time of her death; thereafter the terms of the Trustee [sic] of Seventy-Five Norwell Road Realty Trust provided that the Zoppo Family Trust became the sole beneficiary of the assets of the Seventy-Five Norwell Road Realty Trust.

\*\*\*

It is the contention of the Plaintiff James Zoppo Trustee of the Seventy-Five Norwell Road Realty Trust and The Zoppo Family Trust . . . that the claim against Joseph Zoppo for damages to the property owned by the Seventy-Five Norwell Road Realty Trust is the property of The Zoppo Family Trust and that so much of the Judgment rendered by this Court relating to the real estate located 75 Norwell Road, Dedham, Massachusetts [sic] against Joseph Zoppo in favor of John M. Hayes, Esq., Executor of the Estate of Frances R. Zoppo is in fact property of The Zoppo Family Trust. In fact, this Court's Order of July 12, 2004, did not adjudicate ownership of the claim as between James Zoppo as Trustee of the Zoppo Family Trust or [sic].

B. Joseph Zoppo

Joseph Zoppo seeks dismissal of Count II of James Zoppo's Complaint and the entry of summary judgment in his favor, as well as the dismissal of his Counterclaim without prejudice for the purpose of allowing him to file it in state court. The Debtor argues that James Zoppo is attempting to flout the settlement with Hayes by continuing to litigate a claim which has been determined by this Court and compromised and released with the approval of the Probate Court. Joseph Zoppo argues that because James Zoppo is a beneficiary of the estate of which Hayes is Executor "the settlement agreement is legally binding upon him under Massachusetts statutory and common law." Additionally, Joseph Zoppo maintains that this Court has already ruled that the claim regarding the Norwell Road property belonged to Hayes because this Court entered judgment in his favor. Noting that James Zoppo failed to even attempt to intervene in the adversary commenced by Hayes, he states:

That ruling [this Court's July 12, 2004 decision] was correct, because when the Debtor placed the mortgage on 75 Norwell Road, he was Trustee of the Seventy-Five Norwell Road Trust and his mother, Frances Zoppo, was the beneficiary of the Trust. Any claim that the Debtor's conduct constitutes a



breach of fiduciary duty belonged to the beneficiary of the trust, Frances Zoppo (and later, her estate), and **not** the Plaintiff, as the subsequent Trustee of Seventy-Five Norwell Road Realty Trust.

Citing Mass. Gen. Laws Ch. 2004, §§ 13 and 14, he asserts that the order entered by the Probate Court approving his compromise with Hayes is valid and binding upon all parties, including minors, persons under guardianship and those with “future contingent interests in said estate,” which would include James Zoppo. In other words, Joseph maintains that the settlement binds James Zoppo as a residuary legatee under the will.

In his Supplement to his Opposition, Joseph Zoppo rejects the notion that the claim arising out of the Norwell Road mortgage was the result of a conversion and reiterates that the “breach of fiduciary duty claim clearly belonged to Hayes, the Executor of the beneficiary’s estate, and not to the Plaintiff, as Trustee of the Realty Trust.” Citing Vittands v. Sudduth, 49 Mass. App. Ct. 401, 408-09 (2000)(“(a) tortious intentional infliction of emotional distress is a claim for interference with an individual . . . (b) a person cannot be held as the property of a trust; and (c) a personal injury cause of action is not transferable and cannot thereby be made the subject of a trust”), he adds that the trustee of a nominee trust cannot maintain an action for intentional infliction of emotional distress on behalf of the beneficiary.

Joseph Zoppo also cites New England Trust Co. v. Sanger, 337 Mass. 342, 348 (1958)(“there can be no trust unless there is an existing trust res (Restatement: Trusts, § 74), and that an interest which has not come into existence cannot be held in trust”), in support of his argument that James Zoppo cannot sustain a claim because the assets of the Realty

Trust were transferred to the Family Trust upon the death of Frances Zoppo and, as a result, the Realty Trust ceased to exist. He adds that, in any event, the property located at 75 Norwell Road has been sold. He asserts that “even in the unlikely event that the Realty Trust possessed a ‘conversion’ claim against the Debtor, the Plaintiff, as the Trustee of the Realty Trust has never had standing to raise the claim against the Debtor in this adversary proceeding” and that “if there ever was [sic] such a claim, it passed on to the Trustee of the Family Trust after the death of Frances R. Zoppo, and the Trustee of the Family Trust is bound by the Agreement.” Joseph Zoppo also argues that “[c]ven if the Family Trust became the sole beneficiary of the Realty Trust, it does not provide the Plaintiff with an avenue to escape the Agreement.”

#### IV. DISCUSSION

In Hayes v. Zoppo, this Court determined that an express trust existed for the benefit of Frances Zoppo based upon a variety of documents, including the August 25, 1997 “Allowance by Beneficiaries for Trustee to Mortgage the trust property,” pursuant to which the purported beneficiaries of the Realty Trust, Frances Zoppo and Joseph Zoppo, as trustee of the Family Trust, authorized a mortgage on the 75 Norwell Road property. During the trial in Hayes v. Zoppo, however, neither Hayes nor the Debtor submitted the trust documents creating the Realty Trust and the Family Trust.

The Schedule of Beneficial Interest prepared in conjunction with the Realty Trust is not a model of draftsmanship. Despite the awkward language employed, the Court finds that Frances Zoppo was the beneficiary of the Realty Trust and that upon her death, the

beneficial interest passed to the Family Trust. As the holder of the beneficial interest, she was the equitable owner of 75 Norwell Road. See In re Eastmere Dev., 150 B.R. 495, 498-99 (Bankr. D. Mass. 1993).

In In re Grand Jury Subpoena, 973 F.2d 45(1st Cir. 1992), the United States Court of Appeal for the First Circuit observed the following about nominee trusts:

A nominee trust is a "form of ownership of real estate which is in considerable use in Massachusetts as a title-holding device," Penta v. Concord Auto Auction, Inc., 24 Mass.App. 635, 639, 511 N.E.2d 642 (1987), "one which affords certain tax [and other] advantages," Apahouser Lock & Sec. Corp. v. Carvelli, 26 Mass.App. 385, 388, 528 N.E.2d 133 (1988). Its typical features are the following: (1) the names of the beneficiaries are filed with the trustees, rather than being publicly disclosed; (2) a trustee may serve simultaneously as a beneficiary; (3) the trustees lack power to deal with the trust property except as directed by the beneficiaries; (4) a third party may rely on the disposition of trust property pursuant to any instrument signed by the trustees, without having to inquire as to whether the terms of the trust have been complied with; and (5) the beneficiaries may terminate the trust at any time, thereby receiving legal title to the trust property as tenants in common in proportion to their beneficial interests. See Birnbaum & Monahan, *The Nominee Trust in Massachusetts Real Estate Practice*, 60 Mass.L.Q. 364, 364-65 (1976). The third listed feature is the key to the nominee nature of the trust. Unlike in a "true trust," the trustees of a nominee trust have no power, as such, to act in respect of the trust property, but may only act at the direction of (in effect, as agents for) the beneficiaries. Id. at 365. See, e.g., Johnston v. Holiday Inns, Inc., 595 F.2d 890, 893 (1st Cir.1979) (trustees of nominee trust have "only perfunctory duties"); Apahouser, 528 Mass.App.Ct. at 135, 528 N.E.2d 133 ("trustees are frequently seen as agents for the principals' convenience rather than as trustees in the more familiar fiduciary sense").

973 F.2d at 48.

In view of these principles, it is evident that Frances Zoppo was the beneficiary of the Realty Trust at the time Joseph Zoppo breached his fiduciary duties to her under the terms of the Realty Trust, as well as under the express trust which this Court determined in Hayes

v. Zoppo to have existed as a result of the parties' intentions.<sup>8</sup> The cause of action Frances Zoppo had against her son Joseph Zoppo arose when he mortgaged the property on February 11, 1999; her claim against him was an asset of her probate estate, not an asset of the Realty Trust. The beneficial interest in the Realty Trust belonged to her, not the Realty Trust. The Debtor, as Trustee of the Realty Trust, owed a duty to his mother, and he breached that duty by obtaining her consent to the line of credit either without her knowledge or without full disclosure as to the condition of his business and risks associated with nonpayment of the mortgage, namely that the family home would be unavailable for Thomas A. Zoppo after her death. The injury caused by the Debtor's conduct was to his mother, not the property. In other words, Joseph Zoppo did not owe a fiduciary duty to 75 Norwell Road, he owed a duty to his mother, Frances Zoppo, who had executed a number of documents with the intention of providing for her care and that of her disabled son Thomas A. Zoppo. The damages caused by that breach did not become an asset of James Zoppo as either the trustee of the Realty Trust or trustee of the Family Trust. This Court found that, as a result of Joseph Zoppo's breach of his fiduciary duties to his mother, Frances Zoppo, the debt resulting from the \$190,000 line of credit whose proceeds improperly were used for Input/Output was nondischargeable.

---

<sup>8</sup> In Hayes v. Zoppo, the Court indicated that both Frances Zoppo and Joseph Zoppo were beneficiaries of the Realty Trust. Upon review of the Schedule of Beneficial Interest, however, which was not submitted as an exhibit at trial in Adv. P. No. 02-1346, the Court concludes that that statement, which was based on the "Allowance by Beneficiaries for Trustee to Mortgage the trust property," must be amended as the Schedule of Beneficial Interest shows that the Family Trust was not a beneficiary of the Realty Trust until after the death of Frances Zoppo.

The Family Trust had an expectancy interest in the Realty Trust at the time Joseph Zoppo breached his fiduciary duties to his mother. As a result, the Debtor also breached his duties to the beneficiaries of the Family Trust at time he breached his fiduciary duties to his mother. Thus, conceivably, James Zoppo, as trustee of the Family Trust, would have had standing to bring a claim for damages on behalf of the beneficiaries of the Family Trust under 11 U.S.C. § 523(a). James Zoppo, however, did not articulate a cause of action for breach of these duties or attempt to quantify any damages sustained by Thomas A. Zoppo and the other contingent beneficiaries of the Family Trust that resulted. Rather, he simply insisted that Hayes's claim against Joseph Zoppo with respect to the mortgage on the 75 Norwell Road property belonged to him either as trustee of the Realty Trust or as trustee of the Family Trust. Because Frances Zoppo was the beneficial owner of the Realty Trust and had the power to terminate the Realty Trust at any time prior to her death, the damage to her from the Debtor's decision to squander equity in the property was \$190,000. James Zoppo presented no reason or argument why the damages to the expectancy interest of the Family Trust and its beneficiaries in the Realty Trust would be the same.

As a result of these conclusions, the issues can readily be resolved. James Zoppo as trustee of the Realty Trust and as trustee of the Family Trust may not be bound by the compromise between Joseph Zoppo and Hayes, as the Probate Court determined, but that is not to say that he is entitled to judgment in the amount of \$190,000. Although Joseph Zoppo is collaterally estopped from challenging findings with respect to his breach of fiduciary duties, an examination of the various trust documents submitted as exhibits in

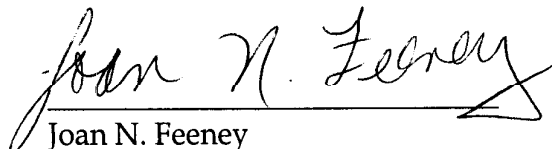
Hayes v. Zoppo, as well as those attached to James Zoppo's Complaint, demonstrate that James Zoppo as trustee of the Family Trust failed to articulate or bring a cause of action on behalf of the beneficiaries of the Family Trust within the time set forth in Fed. R. Bankr. P. 4007 with respect to the any debt owed by Joseph Zoppo other than the debts determined by the Court to be owed to Hayes as executor of Frances Zoppo's estate.

As a further note, the Court observes that James Zoppo's present position that he owns the cause of action with respect to 75 Norwell Road is belated at best. As a legatee of the his mother's will, he was an active participant in the Probate Court proceedings. The Court finds that his present position is untimely and unpersuasive, particularly as he could have obtained, but failed to obtain, clarification as to ownership of the cause of action Hayes brought to fruition.

#### V. CONCLUSION

In view of the foregoing, the Court shall enter an order denying James Zoppo's Motion for Partial Summary Judgment and granting Joseph Zoppo's Motion for Summary Judgment. The Court shall also enter an order dismissing the Debtor's Counterclaim without prejudice.

By the Court,

  
Joan N. Feeney  
United States Bankruptcy Judge

Dated: December 19, 2005

cc: Debtor, Michael B. Feinman, Esq., Isaac H. Peres, Esq., Timothy Mauser, Esq.